Criminal Sanctions for Deterrence Are a Needed Weapon, but Self-Initiated Auditing Is Even Better: Keeping the Environment Clean and Responsible Corporate Officers Out of Jail

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I. INTRODUCTION

Although environmental laws have been on the books since the last century,[1] there has not been great concern for the environment until recently. People may have recognized or heard of the pollution that businesses were generating, but until dirty needles started washing up on beaches, and millions of gallons of oil were spilled into the oceans, people did not start asking for answers and demanding that someone be held accountable. This Comment will first recount the evolution of environmental laws from civil enforcement to criminal enforcement. Second, the "responsible corporate officer" doctrine will be explained and analyzed as a tool of criminal enforcement. Two indicators of the success of this method, convictions and jail time, will put into perspective the development and use of criminal sanctions. Third, the guidelines used by the Department of Justice and the Environmental Protection Agency to decide whether to criminally prosecute a violator or to pursue civil actions instead will be addressed. Fourth, environmental auditing will be examined as a viable method of keeping a company in compliance with the complicated environmental laws. Environmental auditing can serve not only to avoid criminal prosecution of the corporate officers, but also to keep the company on the favorable side of the government if inadvertent violations do occur. Finally, this Comment will discuss the next step necessary for getting more businesses on track with auditing. It will emphasize the crucial need for the government to adhere to its guidelines for prosecution and to provide concrete rather than superficial guarantees that self-initiated environmental auditing by a company will free it from criminal prosecution.

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[1] The Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401–467 (1988).

II. THE MOVE FROM CIVIL TO CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS

Although environmental laws existed well before 1970,[2] a truly organized federal approach did not appear until the creation of the United States Environmental Protection Agency (EPA).[3] Around the same time that Congress decided to establish an organization dedicated to the environment, Congress also decided to enact some major legislation aimed at preserving the environment. It accomplished this by amending the Federal Water Pollution Control Act and other laws.[4] After Congress passed and amended these laws, the EPA had to devise a way to administer them.[5] Specifically, the "EPA had to construct an administrative structure from scratch and establish 'technology-forcing' standards based on complex scientific judgments."[6] Not only were the statutes novel, both to the government and to the industries which would be affected by them, but the science and technology that would be part and parcel to them would also be new developments.[7]

The novelty of the program, the statutes, and the scientific technology involved all created complex problems which required civil and

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[2] The Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (later amended several times and now known as the Clean Water Act); The Clean Air Act, Pub. L. No. 84-159, 69 Stat. 322 (1955) (also later amended several times).

[3] Under the Reorganization Plan No. 3 of 1970, the EPA was created. The plan consolidated duties from other divisions and transferred them into one agency, the EPA. Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970), *reprinted in* 5 U.S.C. app. at 1132 (1982), *and in* 84 Stat. 2086 (1970). *See* F. Henry Habicht II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 ENVTL. L. REP. 10,478 n.2 (1987).

[4] In 1972, Congress amended the Federal Water Pollution Control Act to become the Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (later amended in 1977 and 1987), in order to get tougher on the pollutants and chemicals dumped into rivers and other bodies of water. Also, the Clean Air Act was amended in 1970 to include criminal penalties for violations. Pub. L. No. 91-604, §§ 4(a), 113(c), 84 Stat. 1676, 1686 (1970) (later amended in 1977 and 1990). *See* Dick Thornburgh, *Criminal Enforcement of Environmental Laws—A National Priority*, 59 GEO. WASH. L. REV. 775, 776 n.3 (1991).

[5] *See* Habicht, *supra* note 3, at 10,478.

[6] *Id.* (footnote omitted).

[7] *Id.* The new laws demanded development by industry of revolutionary new ways of making products or dealing with the side effects and wastes generated during production. *Id.*

administrative enforcement in order to be fair to the businesses affected.[8] Until a better understanding of the laws was grasped and the technology needed to comply was developed (or, in some instances, the processes creating the problem were changed), focus on criminal prosecutions for violations would not only have failed to meet the purposes of criminal sanctions,[9] but such focus would have been inherently unfair as well.[10] In addition, the courts were also new players in the field of environmental regulation. They needed to become more familiar with the program, the laws, and the overall changes necessary in business operations before they could become heavily involved in criminal sanctioning.[11]

For the above reasons, the major environmental laws created and developed in the 1970s lacked stiff, if any, criminal enforcement provisions.[12] Therefore, the EPA resorted to civil and administrative enforcement as its primary method of recovering damages and forcing compliance.[13] Throughout the first decade of major environmental regulation, 1970 to 1980, the government prosecuted only 25 criminal environmental cases; in contrast, there were 358 civil actions and 77 consent decrees just in the three-year period of 1977–1980.[14] Because both the industries and the EPA had been given the time necessary to adjust to these regulations, businesses should have approached full compliance by 1980.

However, businesses were still not complying because "[t]he cost of violating environmental laws seemed to be a small enough price to pay compared to the cost of compliance."[15] Without a strong deterrent,

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[8] *Id.*

[9] The purposes of criminal law are prevention, restraint, rehabilitation, deterrence, education, and retribution. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5 (2d ed. 1986). The most important of these, for this Comment's purpose, is deterrence. If businesses have not yet been able to adjust to the new laws or have had difficulties understanding them, although they have put forth a good faith effort to understand them, then no deterrence will be possible because they are doing everything within their powers presently to comply.

[10] *See* Habicht, *supra* note 3, at 10,478.

[11] *Id.*

[12] Thornburgh, *supra* note 4, at 775.

[13] *See* Frederick W. Addison III & Elizabeth E. Mack, *Creating an Environmental Ethic in Corporate America: The Big Stick of Jail Time*, 44 Sw. L.J. 1427, 1430 (1991); James P. Calve, *Environmental Crimes: Upping the Ante for Noncompliance with Environmental Laws*, 133 MIL. L. REV. 279, 285 (1991).

[14] Habicht, *supra* note 3, at 10,479.

[15] Thornburgh, *supra* note 4, at 775. Businesses have even commented that it is cheaper to not comply and pay fines accordingly rather than expend money on the

companies simply endured the civil fines for violations as a cost of doing business, without remorse or concern for the havoc they were wreaking on the environment and, indirectly, on the public.[16] Corporate officers or other corporate decisionmakers who were responsible for instituting the policies and procedures of these businesses were calculating the cost of compliance versus the fine likely to be imposed, instead of developing methods of compliance and avoiding criminal behavior regardless of cost.[17] By the early 1980s, the time had come to start treating the "most egregious conduct" with something more than a simple "slap on the wrist" and a nominal fine.[18]

Tough environmental enforcement was no longer on the back burner. Public opinion had become increasingly strong, demanding that better and more effective action be taken against violators of environmental regulations.[19] Sixty thousand people were surveyed in 1984 to rank crimes in order of severity and the result ranked environmental crime in seventh place—even above heroin smuggling![20] Criminal enforcement had to supplant, or be used in addition to, civil action to respond to this public outcry and force businesses into compliance.[21]

Criminal sanctions for environmental violations were a response to the apathetic compliance attitudes of businesses.[22] "The ultimate goal of criminal sanctions is deterring intentional violations of environmental laws."[23] Criminal sanctions, predominantly jail terms, are significantly more effective deterrents than civil penalties for two major reasons: (1) civil fines can be passed on to the consumer by simply raising the cost of the company's product or service, while jail time cannot,[24] and (2) criminal penalties "drive home the fact that noncompliance is often a crime rather than a business decision," and the stigma and adverse publicity that

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costly technology necessary to comply. *See* Michael K. Glenn, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 AM. CRIM. L. REV. 835, 836-37 (1973).

16 Calve, *supra* note 13, at 284.

17 *Id.*

18 Addison & Mack, *supra* note 13, at 1427.

19 *Id.* at 1429.

20 *Id.*; *see also* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, Jan. 1984, *cited in* Judson W. Starr, *Countering Environmental Crimes*, 13 B.C. ENVTL. AFF. L. REV. 379, 380 n.1 (1986).

21 Starr, *supra* note 20, at 381-82.

22 Calve, *supra* note 13, at 284-85.

23 *Id.* at 284 (footnote omitted).

24 *Id.*

accompany criminal convictions provide incentives to comply.[25]

Several different steps have been taken to develop and enhance criminal enforcement of environmental crimes. The most significant step taken has been criminalizing almost every existing environmental law and providing much stricter sanctions for environmental violators.[26] Violators of these laws can face felony convictions, not lesser misdemeanors, for their actions.[27] The Department of Justice (DOJ), which is the governmental branch responsible for prosecuting environmental crimes, created an Environmental Crimes Unit to better equip itself to deal with the growth of criminal prosecutions of environmental crimes.[28] At approximately the same time, the EPA created its Criminal Investigations Program.[29] The EPA has since recruited and trained an "elite cadre" of criminal investigators who have the authority to execute search and arrest warrants.[30] In addition to these improvements, the federal government has promoted inter-agency cooperation to beef up investigation in the environmental area.[31] The Federal Bureau of Investigations has responded to the EPA's request for help in investigations by focusing on environmental crimes as a "special priority."[32] The combination of all of these factors has created an overall greater effort and commitment to catching and punishing violators: "Criminal enforcement of environmental

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[25] *Id.* (footnote omitted). Not only do chief executives and other high-ranking officers want to avoid jail, but if noncompliance is looked at as a business decision, negative publicity will significantly hurt business and that cost will outweigh the cost of compliance. Although it is the company and generally not the CEO who receives the negative publicity, to be successful, the CEO must make decisions that generate profits and bestow economic benefits on the company. Negative publicity is, thus, something the CEO will want to avoid.

[26] Addison & Mack, *supra* note 13, at 1430.

[27] *Id.* at 1429.

[28] Mary Ellen Kris & Gail L. Vannelli, *Today's Criminal Environmental Enforcement Program: Why You May Be Vulnerable and Why You Should Guard Against Prosecution Through an Environmental Audit*, 16 COLUM. J. ENVTL. L. 227, 229 (1991).

[29] Helen J. Brunner, *Environmental Criminal Enforcement: A Retrospective View*, 22 ENVTL. L. 1315, 1323 (1992).

[30] Habicht, *supra* note 3, at 10,479. They have these powers because the DOJ deputized them, thereby giving them the powers of a United States Marshal, and the agents are known as "Special Deputy U.S. Marshals." Brunner, *supra* note 29, at 1324.

[31] Habicht, *supra* note 3, at 10,479.

[32] *Id.*

laws is not merely a goal, it is a *priority*."[33]

With enforcement as the priority, the DOJ has recently decided that its target is the corporate executive officer.[34] "What happens to the deterrence we talk about? . . . Who is the corporation? . . . I [District Court Judge Tanner] think the public is entitled to know who's responsible. . . . I want the top officer here."[35] Criminal prosecutions of "responsible corporate officers" have steadily increased since the criminal penalties were added to the existing laws, and prosecutions of individuals now outnumber prosecutions of corporations by a three to one margin.[36] "When it investigates an environmental crime, [the] DOJ tries to identify, prosecute, and convict the highest ranking person responsible for the violation."[37] Because these high-ranking officials are generally responsible for the policy and procedure that the company implements regarding its environmental operations, it is extremely important that these officials have the necessary incentive to make decisions that emphasize compliance and immediate notification should an accident or violation occur.

III. THE KEY TO A SUCCESSFUL PROSECUTION—THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

Successful enforcement of environmental laws will, of course, depend upon the success of convicting those who commit such violations. The two major tools that have been developed and expanded to increase the success of criminal environmental prosecutions are: (1) the "responsible corporate officer" doctrine, and (2) a loose general intent requirement for a "knowing" violation.[38]

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[33] Thornburgh, *supra* note 4, at 776 (emphasis added).

[34] *See* Calve, *supra* note 13, at 289.

[35] Joseph G. Block & Nancy A. Voisin, *The Responsible Corporate Officer Doctrine—Can You Go to Jail for What You* Don't *Know?*, 22 ENVTL. L. 1347, 1347 (1992) (quoting U.S. District Court Judge Jack E. Tanner, who would not allow Pennwalt Corporation to plead guilty to illegal dumping of carcinogens into a water source channeled into the Puget Sound until its CEO appeared before the court to acknowledge the seriousness of the offense) (footnote omitted).

[36] Janet L. Woodka, *Sentencing the CEO: Personal Liability of Corporate Executives for Environmental Crimes*, 5 TUL. ENVTL. L.J. 635, 635-36 (1992).

[37] Calve, *supra* note 13, at 289.

[38] Most of the environmental crime statutes have a "knowing" requirement that must be proven before a jury can find the defendant guilty. For example, in order to impose criminal liability under the Clean Air Act, the prosecution must prove defendant "knowingly violat[ed] any requirement or prohibition of an applicable implementation plan . . . ." 42 U.S.C. § 7413(c)(1) (Supp. V 1993). Similarly, the

A. *The Basis of the Responsible Corporate Officer Doctrine*

The basis of the responsible corporate officer doctrine comes from the public welfare area of criminal law, where it is used to "impute knowledge of corporate activity to top corporate officers."[39] Guilt for a conviction of a criminal violation usually requires some amount of blameworthiness.[40] The blameworthiness of an act or omission can be assessed on several different levels—the criminal conduct can be intentional, knowing, reckless, or even negligent—but generally, at least one of these is required.[41] However, courts have treated violations of public health and welfare regulations differently.[42] Because of the danger to the public posed by violations of these laws, the courts have held defendants strictly liable for their actions, or have found guilt on a level that appears to be below one of standard criminal negligence.[43] This area of law has spawned the responsible corporate officer doctrine, and the two leading cases in this area are *United States v. Dotterweich*[44] and *United States v. Park*.[45]

In *Dotterweich*, Dotterweich, the president and general manager of the Buffalo Pharmacal Company, Inc., was charged, along with the company, with violating the Federal Food, Drug, and Cosmetic Act.[46] Although the company was not convicted, Dotterweich was found guilty of "'[t]he

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Resource Conservation and Recovery Act (RCRA) provides penalties for "any person who knowingly transports . . . any hazardous waste . . . to a facility which does not have a permit," 42 U.S.C. § 6928(d)(1) (1988) and "knowingly treats, stores or disposes of any hazardous waste . . . without a permit," 42 U.S.C. § 6928(d)(2)(A) (1988). The Clean Water Act of 1977 (33 U.S.C. § 1319) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §§ 9603, 9604) are two other environmental statutes, among the many, that contain "knowing" elements in their violation requirements.

[39] Block & Voisin, *supra* note 35, at 1347.

[40] *See* LAFAVE & SCOTT, *supra* note 9, at § 1.2(a).

[41] *See id.* at § 3.4.

[42] Stephen Herm, *Criminal Enforcement of Environmental Laws on Federal Facilities*, 59 GEO. WASH. L. REV. 938, 957–58 (1991).

[43] *See* United States v. Park, 421 U.S. 658 (1975). This case may represent a standard below criminal negligence because the defendant had to prove that it was "objectively impossible" to do any more than he actually did to prevent the violation; yet it appears that this defense would mean that the crime is not a strict liability crime.

[44] 320 U.S. 277 (1943).

[45] 421 U.S. 658 (1975).

[46] *Dotterweich*, 320 U.S. at 278. The Federal Food, Drug, and Cosmetic Act of which Dotterweich was charged with violating was, at that time, 21 U.S.C. §§ 301–392 (1938).

introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded.'"[47] The statute was a public welfare regulation purposely requiring no *mens rea* for the protection of the public, who did not have the opportunity to protect itself.[48] The Court affirmed Dotterweich's conviction because of his "responsible share" in an illegal transaction against which the public cannot guard itself.[49] The Court stated:

> The offense is committed . . . by all who do have such a *responsible share* in the furtherance of the transaction which the statute outlaws. . . . Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.[50]

The Court, thus, established its basis for the responsible corporate officer doctrine, which would be further developed and explained in *United States v. Park*.[51]

In *Park*, Park, the president and chief executive officer (CEO) of Acme Markets, Inc., was charged, along with the corporation, with violating the Federal Food, Drug, and Cosmetic Act when he allowed food to be exposed to contamination by rodents that infested the warehouse where the food awaited sale.[52] Unlike Dotterweich, Park had received notification from the Food and Drug Administration that the unsanitary conditions were in violation of the law.[53] Park tried to defend himself on the ground that he addressed the problem with the people in charge of sanitation, to whom he had delegated authority, and although he had the responsibility of general oversight of company operations, there was nothing more he could do.[54] The Court stated that a "responsible relationship" implied some blameworthiness and the government need only prove that "the defendant had, by reason of his position in the corporation, responsibility and

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[47] *Dotterweich*, 320 U.S. at 278 (citing 21 U.S.C. § 331(a) (1938)).

[48] *Id.* at 280–81.

[49] *Id.* at 284–85.

[50] *Id.* (emphasis added).

[51] 421 U.S. 658 (1975).

[52] *Id.* at 660.

[53] *Id.* at 661–63.

[54] *Id.* at 663–64.

authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so."[55] However, the Court emphasized that such an officer could not be convicted based solely on his position in the company; a responsible relation and authority to deal with the situation was necessary to convict.[56] Thus, the Court clarified the responsible corporate officer doctrine that had been created in *Dotterweich* and established the highest standard of care for corporate officials, who will have to assume the duty of prevention or correction of violations if this power is inherent to their position in the corporation.[57]

B. *The Transition—Moving the Responsible Corporate Officer Doctrine into the Environmental Arena*

Because the responsible corporate officer doctrine applies to health and welfare statutes, it is essential that environmental regulations be viewed as such if the doctrine is to be applied to environmental laws. The fact that the statutes aim at protecting the environment and remedying any problems which occur is evidence of an intent to protect the public.[58] The congressional history of the Resource Conservation and Recovery Act (RCRA) explicitly acknowledges that protection of the public's health and welfare is its purpose.[59] *Wyckoff Co. v. EPA*[60] and *United States v. Hayes International Corp.*[61] are just two cases among many that evidence the courts' firmly established acceptance of environmental laws as public health and welfare regulations.[62] Because environmental laws have become firmly rooted in the health and welfare context, an analysis of the developments and modifications to the responsible corporate officer doctrine as applied to the environmental statutes must be conducted.

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[55] *Id.* at 673-74.

[56] *Id.* at 674.

[57] *Id.* at 676. It should be noted that *Park* does not create a strict liability standard for it leaves the defendant with the defense of objective impossibility. *See supra* note 43.

[58] Block & Voisin, *supra* note 35, at 1350.

[59] *Id.*

[60] 796 F.2d 1197 (9th Cir. 1986) (holding that "[t]he Resource Conservation and Recovery Act . . . , 42 U.S.C. § 6901 *et seq.*, was enacted to protect the national health and environment." *Id.* at 1198).

[61] 786 F.2d 1499 (11th Cir. 1986) (holding that "section 6928(d)(1) [part of RCRA] is undeniably a public welfare statute, involving a heavily regulated area with great ramifications for the public health and safety." *Id.* at 1503).

[62] Block & Voisin, *supra* note 35, at n.9.

Unlike the Food, Drug, and Cosmetic Act, upon which *Park* and *Dotterweich* are based, environmental laws are not strict liability crimes because they incorporate some type of *mens rea*, usually a "knowing" standard, into the crime.[63] Because the statutes contain knowledge requirements, strict application of the responsible corporate officer doctrine as described in *Dotterweich* and *Park* is not possible.[64] Instead, the doctrine has been modified to act as evidence of knowledge by inference only, and not as a method of holding the officer liable by reason of the power inherent in his position.[65] Before reviewing this modification, a look at the intent requirements of the environmental statutes is necessary.

Unlike most statutes, which require proof of specific intent for a conviction,[66] environmental laws have been read to require only general intent.[67] The courts' application of a general intent standard to environmental statutes has resulted in requiring only proof of the defendant's knowledge of his actions, rather than proof of knowledge of the violation, for a conviction.[68] The effect of this general intent standard is, that to prove criminal knowledge, the government need only prove the defendant's actions were voluntary, rather than accidental or mistaken.[69] Nonetheless, knowledge of the actions is necessary for conviction. Therefore, the responsible corporate officer doctrine has been adopted and modified by the courts and prosecutors to establish this last vital link for a conviction.

In *United States v. Johnson & Towers, Inc.*,[70] the company and an employee (a foreman of the facility) were charged with violating RCRA by disposing of hazardous waste unlawfully.[71] The Third Circuit held that employees, as well as owners and operators of the plant, could be charged if they "knew or should have known" that the company had not complied with the permit requirement.[72] In order to establish this knowledge, the court stated that the jury would be permitted to *infer* knowledge "as to

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[63] *See supra* note 38.

[64] *See* Block & Voisin, *supra* note 35, at 1354–58.

[65] *Id.*

[66] LAFAVE & SCOTT, *supra* note 9, at § 3.5(e).

[67] Block & Voisin, *supra* note 35, at 1357.

[68] *See* United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984) ("knowing" about conduct in certain regulatory statutes means knowledge of actions taken, not knowledge of the statute itself (citing United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563 (1971))).

[69] Block & Voisin, *supra* note 35, at 1357–58.

[70] 741 F.2d 662 (3d Cir. 1984).

[71] *Id.* at 663–64.

[72] *Id.* at 664–65.

those individuals who hold the requisite responsible positions with the corporate defendant."[73] Thus, the responsible corporate officer doctrine can be used as a tool to allow the jury to infer that the employee has the knowledge necessary for a conviction, and it significantly lightens the burden of the prosecution in environmental cases.

In *United States v. MacDonald & Watson Waste Oil Co.*,[74] the First Circuit established a similar use of the responsible corporate officer doctrine, but made it extremely clear that the doctrine was *not* a substitute for knowledge. The appellate court reversed the district court when it found that the district court's jury instructions allowed, in effect, the jury to find knowledge based solely on proof that the defendant was a responsible corporate officer.[75] According to the appellate court, this doctrine cannot replace proof of knowledge. However, the appellate court explained that the district court could have instructed the jury to use circumstantial evidence to find knowledge and that the defendant's position as a responsible corporate officer could be a valid part of such circumstantial evidence.[76] "[T]he [district] court could, had it wished, have elaborated on the extent to which [defendant's] responsibilities and duties might lead to a reasonable inference that he knew of the . . . transaction."[77] The court, thus, established a wise adaptation of the responsible corporate officer doctrine: it is a possible piece in proving knowledge, but other pieces of evidence should be used in conjunction with it in order to effectively prove defendant's knowledge.

One of the most expansive uses of the responsible corporate officer doctrine can be found in the Tenth Circuit's decision in *United States v. Brittain.*[78] The defendant appealed his conviction under the Federal Water Pollution Control Act of 1972 (Clean Water Act) for discharging pollutants into the water.[79] The evidence revealed that the defendant, the operational manager of the plant discharging the pollutants, had substantial knowledge of violations and willfully allowed the violations to continue.[80] Because his defense was based on the argument that he was not a "person" under the statute,[81] a reading the court ultimately rejected, the court's interpretation

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[73] *Id.* at 670.
[74] 933 F.2d 35 (1st Cir. 1991).
[75] *Id.* at 52.
[76] *Id.*
[77] *Id.*
[78] 931 F.2d 1413 (10th Cir. 1991).
[79] *Id.* at 1414.
[80] *Id.*
[81] *Id.* at 1418–19.

of "responsible corporate officer" is only dicta. However, it is important to note the expansive reading the court gave it:

> We interpret the addition of "responsible corporate officers" as an expansion of liability under the Act rather than . . . an implicit limitation. . . . Under this interpretation, a "responsible corporate officer," to be held criminally liable, would not have to "willfully or negligently" cause a permit violation. Instead, the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility.[82]

Although only dicta, this language is a good indication of the court's willingness to allow knowledge of criminal negligence to be established very circumstantially, and without any significant amount of substantial proof.

Although not all of the circuits have allowed such expansive use of the responsible corporate officer doctrine, most of the courts have very loose requirements for proving general intent, thus leaving the prosecution with a very light burden.[83] The responsible corporate officer doctrine combines with the loose general intent requirement to serve as a formidable weapon in a criminal prosecution.[84] As long as evidence of knowledge is used in conjunction with evidence of defendant's status as a responsible corporate officer, an effective deterrent to criminal environmental violations as a "cost of doing business" has been created. High ranking officials now have incentive to become aware of the activities in their facility and implement programs that will keep them out of the courtroom. However, the strength of the deterrent depends both on the success of convictions and the penalties accompanying such convictions.

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[82] *Id.* at 1419.

[83] *See* United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989) (declining to follow other circuits and finding that knowledge of the permit status for disposal of waste was inherent and that the director need only know that his disposal was "harmful" to the environment, not "hazardous" as defined in the statute); United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986) (holding that knowledge of the permit status of the facility is necessary for a conviction, but that knowledge does not require certainty; and jurors can draw inferences from all of the circumstances).

[84] The increased success in obtaining pleas and convictions for environmental violations and the increased harshness in the corresponding sentences illustrate how these two components have become a formidable weapon. *See infra* notes 87–89 and 101–04 and accompanying text on statistics of convictions and sentencing.

C. *Success of Prosecuting and Sentencing for Environmental Crimes*

1. *Criminal Prosecution of Environmental Crimes*

As noted before, there were only twenty-five criminal prosecutions for environmental violations throughout the entire 1970s.[85] The climate has changed, however, and since the Environmental Crimes Unit was created, indictments and prosecutions have steadily increased.[86] In 1983, there was only a total of forty defendants who were indicted for environmental violations, and forty pleas and convictions were obtained.[87] Throughout the rest of the 1980s, however, there was a steady climb, and in 1989, 101 defendants were indicted and, even more impressive, 107 guilty pleas and convictions were acquired.[88] In fact, the government became so proficient at prosecuting environmental crimes that in 1990, the Assistant Attorney General in the Environment and Natural Resources Division of the DOJ said that the conviction rate for environmental crimes was above *ninety-five percent.*[89] The government, now armed with its specialized criminal investigations and prosecution department for environmental crimes, is most often successful in obtaining either a guilty plea or a conviction from the "responsible" people it targets.

2. *The Punch that Goes with Conviction—Sentencing the Environmental Criminal*

If a convicted criminal was never penalized for his guilt, a conviction would have little effect. Originally, when people were convicted for environmental crimes, the penalties were minimal.[90] However, as attitudes towards environmental violations and the culprits have changed, so have the penalties.[91]

From the beginning and continuing throughout the early to mid-1980s, federal judges had immense discretion in sentencing those convicted of

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[85] *See supra* note 14 and accompanying text.

[86] *See* Edward W. Brady, *A Wrong Turn on the Road to Effective Enforcement; A Critical Analysis of the Environmental Crimes Act of 1990*, 1 DICK. J. ENVTL. L. & POL'Y 23, 24 (1991).

[87] Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, app. B (1991).

[88] *Id.*

[89] Addison & Mack, *supra* note 13, at 1438–39 and n.102.

[90] *See infra* note 95 and accompanying text.

[91] *See supra* note 20 and accompanying text ranking environmental crimes.

environmental crimes.[92] Once a judge had a defendant convicted of a federal crime before him, "[he] could sentence [the] defendant to hours or years of imprisonment, place the defendant on probation, or simply impose a fine," knowing that his decision would only be overturned for manifest abuse.[93] The large amount of discretion in the system allowed for huge disparities in sentencing two defendants for the same crime. Thus, a defendant in Maine could receive a light sentence that was suspended and substituted with probation, while another in California could serve all his time in prison.[94] As a result of this system, where judges used their discretionary power to avoid imposing harsh sentences for first-time offenders in this relatively new area, defendants convicted in the early to mid-1980s did not receive terribly harsh sentences and spent little, if any, time in jail.[95]

In 1984, the Comprehensive Crime Control Act was passed, establishing the United States Sentencing Commission.[96] This independent commission of the judicial branch set out to establish, *inter alia*, "certainty and fairness in meeting the purposes of sentencing" and to avoid "unwarranted sentencing disparities among defendants with similar records . . . ."[97] Shortly thereafter, the Federal Sentencing Guidelines were promulgated and became effective in 1987.[98] One of its basic goals was to set up a system that had the requisite power for effectively combatting crime by employing uniformity and proportionality in moving towards its goal.[99] The Federal Sentencing Guidelines have forced judges to deal with environmental criminals much more seriously; sentencing has become much less a matter of discretion and has turned into, generally, "mathematical computations."[100] Congress showed that it wanted defendants convicted of violating environmental laws treated as what they are—criminals.

In 1983, a total of eleven years in sentences were imposed on

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[92] Jane Barrett, *Sentencing Environmental Crimes Under the United States Sentencing Guidelines—A Sentencing Lottery*, 22 ENVTL. L. 1421, 1422 (1992).

[93] *Id.*

[94] *See* Judson W. Starr & Thomas J. Kelly, Jr., *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and It Is Hard Time*, 20 ENVTL. L. REP. 10,096, 10,097 (1990).

[95] Adler & Lord, *supra* note 87, at app. E.

[96] 28 U.S.C. § 991(a) (1988).

[97] 28 U.S.C. § 991(a), (b)(1)(B) (1988).

[98] UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1994).

[99] *Id.* at 2.

[100] Starr & Kelly, *supra* note 94, at 10,096.

environmental criminals, but only five years were actually served.[101] In contrast, the year 1989 generated fifty-one years and twenty-five months in sentences for those people who broke the law after the enactment of the Federal Sentencing Guidelines.[102] Despite the fact that only thirty-six years and fourteen months were actually served,[103] the increase was significant, especially because the Federal Sentencing Guidelines abolished parole.[104] The stiffest penalties allowed by the statutes and the guidelines, however, are usually still not imposed.[105] This fact should not put responsible corporate officers at ease because the government and courts are still very willing to make environmental criminals pay much more than before.

The intended effect of the responsible corporate officer doctrine is to force CEOs and high-ranking officials to develop new, responsible attitudes about business and the environment that will result in greater compliance. Civil and administrative penalties have proven to be insufficient deterrents in many cases where managers willingly and knowingly violate the law as a cost of doing business.[106] The responsible corporate officer doctrine is a viable and necessary weapon for improved deterrence. CEOs are in the best position, and now have the most incentive with the threat of jail time, to make the needed changes for company compliance. Applied in the correct manner, the responsible corporate officer doctrine is a fair and useful tool for keeping the environment cleaner and safer for the public.

IV. AN INTELLIGENT RESPONSE—USING AUDITS TO COMPLY AND TO AVOID CRIMINAL PROSECUTIONS

> It is EPA policy to encourage the use of environmental auditing by regulated entities to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards.[107]

The best way for a company and, particularly, its high-ranking officers, to respond to the government's new threat of criminal prosecution

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[101] Calve, *supra* note 13, at 288 n.48.

[102] *Id.*

[103] *Id.*

[104] Starr & Kelly, *supra* note 94, at 10,097.

[105] Adler & Lord, *supra* note 87, at 800–01.

[106] *See supra* notes 16–17 and accompanying text.

[107] Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986) [hereinafter Policy Statement].

is to implement an audit program. Both the EPA and the DOJ look favorably upon industries that use such programs. The government should give credit to the CEOs and other officers for these programs because, generally, they are the people responsible for creating and implementing them. "Regulated entities are responsible for taking all necessary steps to ensure compliance with environmental requirements, whether or not they adopt audit programs . . . . [U]ltimate responsibility for the environmental performance of the facility lies with top management . . . ."[108] If the top officers are held responsible for violations, then, correspondingly, they should also be given credit for their attempts at compliance, including audit programs. The CEO should always put a good faith effort into the program and be ready to make any corrections or take any remedial measures necessary to fix or prevent problems once the plan has been enacted. Although there are downsides to these comprehensive programs that will be discussed below, the benefits outweigh the costs and everyone should benefit overall when an effective and comprehensive compliance program has been put into effect.

A. *The Department of Justice's Guidelines on Who to Target for a Criminal Prosecution*

> It is the policy of the Department of Justice to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal environmental enforcement discretion.[109]

The EPA and the DOJ now have a high-powered arsenal of special agents to investigate violations and favorable standards for proving knowledge to prosecute environmental violators. However, this does not mean that they will automatically seek a criminal indictment in every situation. Civil and administrative remedies still remain viable options and are most often used, especially when the DOJ believes the defendant's "good" behavior merits an exemption from criminal prosecution.[110] The

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[108] *Id.* at 25,006-07.

[109] U.S. DEPARTMENT OF JUSTICE, *Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator*, July 1, 1991, *reprinted in* James R. Moore, *Environmental Criminal Statutes: An Effective Deterrent?*, 1992 CRIM. ENFORCEMENT ENVTL. L. 137, 162 [hereinafter *Factors in Decisions*].

[110] In this context, "good" means that either the defendant had put a good faith

DOJ has promulgated guidelines that it follows when an environmental violation has occurred and uses the guidelines when deciding what type of sanctions should be sought.[111]

To determine when to prosecute, the DOJ looks at five main factors: voluntary disclosure, cooperation, presence of a compliance program, condonation of unlawful activity, and the scope and nature of subsequent compliance efforts.[112] Regarding preventative measures of a compliance program and the program itself, the DOJ has said:

> The [prosecutor] should consider the existence and scope of any regularized, intensive, and comprehensive environmental compliance . . . or management audit. Particular consideration should be given to whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance, and whether the program was adopted in good faith in a timely manner.[113]

When investigating a company's compliance program, the DOJ is greatly concerned with the defendant's institutional policies and procedures.[114] One such aspect the DOJ investigates is the adequate safeguards, if any, beyond what the law calls for, and what measures were taken, not only to detect and evaluate violations, but also to report and remedy them when they occur.[115] Although the DOJ's framework does not legally bind the DOJ to forego criminal prosecutions when the above have been implemented in some form,[116] there is a great chance that the company and the responsible officer will be exposed only to administrative or civil penalties, not criminal ones.

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effort into complying with the laws through an auditing program or some other program or the defendant willingly cooperated with the DOJ once the violation had occurred. *See Factors in Decisions, supra* note 109, at 165-66.

111 *Id.*

112 Jed S. Rakoff & Alex Lipman, *Civil and Criminal Enforcement of Federal Environmental Laws: Basic Provisions and Current Controversies*, 797 P.L.I./Corp. 611, 626 (1992).

113 *Factors in Decisions, supra* note 109, at 165.

114 *Id.*

115 *See id.*

116 The DOJ's memorandum (*Factors in Decisions*) is only a guideline and the DOJ is in no way bound legally to the provisions listed within it. *See* Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365, 400 (1992).

B. *The Audit Program*

An environmental audit program is basically an extensive or rigorous self-evaluating, self-policing program which a business implements to assist it with maintaining compliance with tough and complex environmental regulations.[117] According to the EPA, an environmental audit is "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."[118] Audit programs tend to be broken into two groups, "compliance audits" and "management audits," and the focus of each is slightly different.[119] Compliance audits are primarily concerned with investigation by an environmental expert of compliance with the environmental laws and regulations; management audits focus on "review of the managerial risk-control systems and procedures used by the corporation or facility to detect and remedy possible violations and potentially problematic environmental conditions."[120]

One type of program need not be used at the exclusion of the other. The primary goal, which must always be kept in mind, is compliance, and a combination of the two types of audits might form the best program to meet that goal. The focus of the CEO must first be on determining the company's needs for achieving compliance so that he can then develop an efficient, effective program that specifically addresses these needs.

1. *The Current State of Affairs*

Regulated business facilities are not required by law to develop or maintain audit programs.[121] This lack of mandatory regulation is a benefit to the EPA, but primarily it benefits the regulated facility and its chief officer. The EPA benefits because a mandatory program would require the agency to commit much of its scarce resources to developing and enforcing these programs.[122] Instead of spending its resources on this program, the EPA can channel its funds into prosecuting violators and repairing or

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[117] Daniel Riesel, *Criminal Enforcement and the Regulation of the Environment*, 1993 ENVTL. LITIG. 869, 909-10.

[118] Policy Statement, *supra* note 107, at 25,006 (footnote omitted).

[119] Hunt & Wilkins, *supra* note 116, at 366.

[120] *Id.* (footnote omitted).

[121] Policy Statement, *supra* note 107, at 25,006.

[122] George Van Cleve, *The Changing Intersection of Environmental Auditing, Environmental Law and Enforcement Policy*, 12 CARDOZO L. REV. 1215, 1221-22 (1991).

remedying damages caused by the violations. The EPA and the public also benefit from voluntary rather than mandatory programs because the quality of a compliance program depends on the management's genuine commitment to it and its objectives.[123] Therefore, a voluntary program with higher commitment produces a better overall program. If enough incentives exist such that most industries will voluntarily develop these compliance programs, the EPA's efforts are better spent elsewhere than enforcement and regulation of them.

The company and CEO receive the primary benefit of nonregulated, nonmandated programs through the freedom to develop a custom-built program that best addresses the needs and specifications of that individual facility. The "EPA agrees that presenting highly specific and prescriptive auditing elements could be counter-productive by not taking into account numerous factors which vary extensively from one organization to another . . . ."[124] Every regulated facility will not be in danger of violating every environmental law; the limited focus and production of an industry might pose a threat of violations to only one environmental law. For example, a company's by-product and current disposal system might be in danger of violating the Clean Water Act while it will not be in danger of violating RCRA, the Clean Air Act, or the Comprehensive Environmental Response, Compensation, and Liability Act.

The CEO is in the best position to evaluate the specific areas in need of monitoring and compliance and can develop a program tailored to meet these specific needs. If the EPA were to develop general standards for a mandatory compliance program, a CEO might be forced to implement costly monitoring systems to meet the EPA's requirements even though the CEO's facility poses no environmental threat in that area. Also, the top management understands the operations and procedures of its facility best, so it can develop a program that runs most efficiently and effectively in conjunction with these operating systems. With the freedom to choose and develop his own type of program, the CEO has the opportunity to create the most cost-efficient and compliance-effective program for his company, which will ultimately result in substantial savings.

Although there is no standard or generic auditing program that a business must use, the overall program should include certain features to make it effective. Planning and a commitment of a significant amount of resources are necessary parts of every program.[125] Usually included in an audit program are full examinations of records regarding emissions of

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[123] Policy Statement, *supra* note 107, at 25,007.

[124] *Id.* at 25,005.

[125] Kris & Vannelli, *supra* note 28, at 240.

pollutants, permit status checks of the facility, practices of handling and transporting hazardous materials, and storage of such materials.[126] Not only should periodic written reports be generated, but also the responsible corporate officer should become involved in the program by implementing environmentally-conscious practices and procedures that must be followed.[127] Because subordinate managers often feel pressured to increase company profits in order to be recognized or promoted,[128] the CEO should not just implement "good-looking" environmental policies and procedures; he must also make it absolutely clear that these practices are to be strictly adhered to rather than just paying lip service to them. "Commanders and supervisors also have a duty to train subordinates at all levels for the environmental compliance mission."[129] Because the responsible corporate officer doctrine requires great vigilance on the part of the CEO and may hold him responsible for his subordinate's illegal behavior in some circumstances,[130] instituting open lines of communication and regular oversight of his subordinates should insulate the CEO from criminal prosecution for the subordinate's illegal behavior if it occurs and if it is in direct contravention of the company's policies. A true, good-faith effort in instituting a high-quality, comprehensive compliance program should be the goal of all responsible corporate officers as it is one of the best defenses to a criminal prosecution.

Audit programs help protect the corporation from criminal prosecution because they provide an effective means for identifying and immediately correcting violations, before the government initiates an action against the corporation. "Environmental auditing has developed for sound business reasons, particularly as a means of helping regulated entities manage pollution control affirmatively over time instead of reacting to crises."[131] With the proper program in place, a company can quickly identify the problem and immediately address the situation with appropriate measures before the problem turns into a disaster that would mandate the involvement of the EPA and the DOJ. Because corporations are not physical beings capable of making their own decisions, these programs

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[126] *Id.*

[127] *See* Addison & Mack, *supra* note 13, at 1439–40.

[128] *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 397–99 (1981).

[129] Calve, *supra* note 13, at 344.

[130] *See* United States v. Brittain, 931 F.2d 1413, 1418–19 (10th Cir. 1991); *see also* Calve, *supra* note 13, at 343–44.

[131] Policy Statement, *supra* note 107, at 25,006 (footnote omitted).

should protect the high-ranking officials who have become main targets. These high-ranking officials are the people who create and implement the programs and, correspondingly, must get the respective credit for doing so. As long as the DOJ adheres to its policy statement,[132] even if a business does not remedy the problem before action is taken (assuming the behavior was not willful and its conduct not egregious), that action by the DOJ will only be administrative or civil.

One of the most important benefits of a comprehensive compliance program is the one the public receives—a cleaner environment. Many environmental laws contain self-reporting requirements,[133] and the EPA needs accurate reports to be successful in protecting the environment.[134] If these programs are instituted, there will be less likelihood of misstatements or misrepresentations reported by the company from lack of knowledge of the facility's status, and also, a reduction in the chance of putting the "integrity of the [EPA's] system [of monitoring and regulating] in danger."[135] With a comprehensive compliance program in place, the company is in a better position to respond when violations or accidents occur. Further, the EPA, if immediately notified, can help remedy the situation. Also, the difficulties in complying with complex environmental regulations and the need for auditing produces a "best management" effect.[136] If best management is a result of such programs, businesses are in better positions to prevent accidents rather than just responding effectively to them. Prevention of problems can lead to huge savings in the clean-up costs that always accompany remedying the problem.[137] Increased success of the EPA combined with better management will then provide an overall cleaner environment.

There are, however, downsides to auditing programs.[138]

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[132] *See supra* notes 109–13 and accompanying text.

[133] CERCLA requires notification of any hazardous releases (hazardous materials being defined in the statute) into the environment. 42 U.S.C. § 9603 (1988). RCRA requires various statements and information as well as records that must be reported under 42 U.S.C. § 6928(d)(3) (1988).

[134] Memorandum from Thomas Adams, Assistant Administrator, EPA Officer of Enforcement and Compliance Monitoring, to Assistant Administrator, et al., EPA, *Environmental Criminal Conduct Coming to the Attention of Agency Officials and Employees*, at 1–2 (Sept. 21, 1987).

[135] *Id.*

[136] *See* Kris & Vannelli, *supra* note 28, at 228. The traditional goal of the EPA in encouraging audits was to improve the management of environmental facilities, thereby improving compliance. Van Cleve, *supra* note 122, at 1234.

[137] *See* Kris & Vannelli, *supra* note 28, at 244.

[138] *See* Riesel, *supra* note 117, at 910–11.

Environmental audits may often reveal violations that could trigger government action against a company if the government believes the company was not acting in "good faith" or was deficient in some other area.[139] The United States is allowed to use these audits in a criminal prosecution, and when the DOJ does use them, they are an effective source of evidence for proving a knowing violation.[140] An audit is effective because the government now has documented proof that the company and its CEO were aware of the violation and, therefore, can prove the knowing element. Moreover, unless the company has produced the audits using a particular method to shield them from the government (such as having them prepared by counsel so as to be protected by the attorney work product doctrine), these damning audits can be subpoenaed and forced to be turned over under discovery rules.[141] In addition to these problems, audit programs can be an extremely expensive cost to the company.[142] A company may feel cheated or at a significant economic disadvantage if its competitor has not initiated these programs and is subsequently saving on the outlay cost for them.[143] Although there are disincentives to auditing, a responsible corporate officer should nonetheless implement in good faith a comprehensive program that includes provisions for responding to problems once they occur in order to maintain favorable standing with the DOJ.[144]

2. *A Change Is Needed—The Government Must Adjust Current Laws and Policies to Create Better Incentives for Companies to Voluntarily Implement Auditing Programs*

The government must always remember and emphasize that environmental *compliance*, not successful prosecution of CEOs, is the goal.[145] When the government's prosecutorial power under the responsible corporate officer doctrine is examined in conjunction with the DOJ's and

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[139] *See* Van Cleve, *supra* note 122, at 1227.

[140] *See* Hunt & Wilkins, *supra* note 116, at 367.

[141] *Id.* at 376–88. For a good explanation of the possible methods of protecting environmental audits from discovery, see *id.* at 376–92.

[142] *See* Kris & Vannelli, *supra* note 28, at 240, 244–45.

[143] This, of course, is true only if companies without programs manage to either: (1) maintain compliance (which is unlikely bearing in mind the complexity of environmental laws), or (2) escape the notice of the EPA.

[144] James R. Moore, *Environmental Criminal Statutes: An Effective Deterrent?*, 1992 CRIM. ENFORCEMENT ENVTL. L. 137.

[145] Hunt & Wilkins, *supra* note 116, at 374.

the EPA's current guidelines regarding audit programs, a goal of punishment seems to be created. Currently, the government has a very light burden for proving a knowing violation,[146] which can be easily met by forcing companies to turn over their audit reports that document the areas of noncompliance.[147] Conversely, very little protection exists for the CEO in the environmental realm. "If the form [or goal] of punishment discourages compliance-related efforts, the enforcement policy should be re-examined."[148] The government needs to re-evaluate and correct its current policies so the emphasis is shifted back to compliance and away from punishment.

The government should make several changes to create more auditing incentives and to offset the disincentives because: (1) the success of the EPA depends on accurate self-reports from businesses,[149] and (2) the public benefits overall from auditing programs.[150] The first change that should be made is instituting a *legally* binding policy that will prevent the government from criminally prosecuting companies with compliance programs if a good faith effort has been a proven element of the program. A "guarantee" is not enough.[151]

A critical, comprehensive, self-initiated program will involve documenting every aspect of a company's environmental compliance status, including violations and potential risks. Without this information, a company will not be in a position to address its weaknesses and remedy current violations; however, a CEO is very reluctant to document this information because it can currently be used against him in a criminal prosecution.[152] Once the government allows the CEO to protect such records when generated under a good faith audit program and in the absence of egregious conduct, more high-ranking officials will authorize these rigorous and much needed self-evaluations. Also, this binding guarantee allows greater exchange of information within the company and between managers because they do not have to worry about disclosure or about expending extra and needless money to use a costly special method of preparation (*i.e.*, the attorney work product doctrine)[153] to protect these reports. The public benefits from a cleaner environment without a

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146 *See supra* part III.B.

147 *See supra* notes 139–41 and accompanying text.

148 Hunt & Wilkins, *supra* note 116, at 374.

149 *See supra* notes 134–35 and accompanying text.

150 *See supra* text accompanying notes 133–37.

151 *See supra* note 116 and accompanying text.

152 *See supra* notes 139–41 and accompanying text.

153 *See supra* note 141 and accompanying text.

substantial increase in the cost of the company's products. Of course, the good faith element of the standard for precluding disclosure must be defined as clearly as possible so businesses have an idea of the high standards that must be met.

The second change that should be made is implementing an "environmental excellence" program for the companies which meet the high standards of a model compliance program.[154] The program should consist of two main parts. The first part should entail giving the company public recognition as an "environmentally conscious" organization.[155] As noted before, the public has become much more concerned about the environment and is demanding that it be treated as a top priority.[156] If a company receives a public designation for its environmental compliance efforts, the business will most likely receive an economic benefit due to increased popularity and enhanced public image. The EPA must create a model program with very high standards that go beyond mere compliance and demand complex or extensive maintenance and monitoring of environmental facilities for participation in the program.[157]

The environmental excellence program should also contain either a grace period for remediation of violations or a presumption against prosecution. If using a grace period, the government should establish a specified time period which immediately follows a violation that allows a company participating in the program to immediately remedy the problem without threat of prosecution. A participating company should have an environmental response and remediation program in operating order to be a part of the environmental excellence program and to address these problems as they occur. If the company does repair any and all damages within the grace period, no criminal action should be initiated by the government.

A strong presumption against enforcement may be used in lieu of the grace period. "Where the regulated entity has [implemented an environmental excellence program] and the problems disclosed have been addressed in good faith in a timely and appropriate manner, there should be

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154 *See* Moore, *supra* note 144, at 157.

155 *See id.* at 157–58.

156 *See supra* notes 19–21 and accompanying text.

157 The EPA is currently looking into such an incentive program called the "Environmental Leadership Program," 58 Fed. Reg. 4802 (1992), but the details and components are quite sketchy. The agency has requested input from the public as it develops the program. David T. Buente, Jr. et al., *Developing and Implementing an Environmental Corporate Compliance Program*, 1993 CRIM. ENFORCEMENT ENVTL. L. 85.

a strong presumption against enforcement."[158] The government is not absolutely precluded from taking actions, both civil and criminal, against the company, but the prosecuting authority should be required to specifically state the reasons that warrant such actions at each stage of the investigation.[159] This strong presumption requirement should help deter the government from taking actions against the company in response to public outcry when, in actuality, seeking sanctions or convictions is strongly against public policy.[160] The two elements of an environmental excellence program, taken together, should create an attractive incentive for high-ranking officials to implement much needed compliance and monitoring systems, while the public benefits overall from a cleaner environment.

Finally, new and much higher penalties should be enacted to allow the government to seek additional punitive damages for businesses and CEOs it prosecutes where it can be proven that the violation would not have occurred if the company had been using a comprehensive audit program.[161] Although it may be difficult to prove, this penalty would give responsible officers who currently want to cut costs by foregoing these audit programs great incentive to enact them: the risk of losing an even greater amount of money under a prosecution than its competitor (who is using an audit program) would have to pay will help the CEO view cost cutting decisions in a different light. Additionally, greater revenues would be generated that could be contributed to the very expensive clean-up costs involved in environmental disasters, or used to improve monitoring and enforcement of the environmental laws. These changes would increase the rate of voluntary self-evaluation and create greater protection for the environment.

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[158] James R. Moore & David Dabroski, *EPA Environmental Auditing Policy and Federal Criminal Enforcement*, 1991 CRIM. ENFORCEMENT ENVTL. L. 207, 225 (emphasis deleted).

[159] *Id.*

[160] Unwarranted prosecutions sought in response to the public's reaction to the violation is against public policy because it is a strong disincentive for companies to expend the large amounts of money and time necessary to develop these high-technology compliance programs. No CEO will implement such a costly system if the risks of prosecution still remain high.

[161] This type of penalty potentially raises constitutional problems because audit programs are not currently mandated by law. A party subject to this new penalty might raise Equal Protection or other constitutional arguments in its defense. This issue would have to be considered and addressed if the new punitive damages were enacted.

V. CONCLUSION

Although many high-ranking business officers do not like the responsible corporate officer doctrine and the lenient knowledge standards in the environmental laws, these powerful prosecution tools force corporate officers to be responsible or pay the price. The environment needs protection, and imposing a high duty of care upon the people who have the power to make the necessary changes is an effective and much-needed deterrent. Correspondingly, audit programs should be implemented to meet this high duty of care so the public will benefit overall. Although these programs entail a lot of work and a substantial cost, these programs focus on compliance and prevention which will save a corporation money in the long run. By preventing huge disasters and remedying problems immediately with programs developed to better assist situations needing a quick response, the company saves large amounts of money that it would have had to expend for clean up, and it avoids the negative publicity that now inevitably follows an environmental disaster. To be fair, though, the government needs to make certain changes on its part to give executives incentives to devise these programs and reward them for doing so when done in good faith.

The government must always remember that compliance is the goal, not a successful criminal prosecution, because compliance is the best and most effective way to keep the environment clean and the public safe. In order to reach this goal, the government must give guarantees, not guidelines, that criminal prosecution will be avoided if comprehensive compliance programs are instituted. The government must be more willing to recognize and reward these industries and high-ranking officials for their compliance efforts so that more industry officials will take the initiative to do an audit and make compliance a corporate goal. Lastly, additional penalties should be imposed by the government where it can be proven that an environmental violation would not have occurred if an audit program had been in place.

These combined steps will serve to provide enhanced (or sufficient) incentives and rewards for self-initiated corporate auditing programs, and will promote the ultimate goal of a clean environment while keeping corporate officers out of jail.